(4)

No. 99-1596

FILED

JUN 12 2000

CLERK

IN THE

Supreme Court of the United States

CARNIVAL CRUISE LINES, INC.; HAL ANTILLEN, N.V.; HAL SHIPPING, LTD.; WIND SURF LIMITED; HOLLAND AMERICA LINE, N.V.; and HAL CRUISES LIMITED.,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

ROBERT H. BORK
1150 Seventeenth St., N.W.
Washington, D.C. 20036
(202) 862-5851

ROBERT P. PARKER
(Counsel of Record)
ROBERT E. MONTGOMERY, JR.
GAELA GEHRING FLORES
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
1615 L Street, N.W.
Washington, D.C. 20036
(202) 223-7300

Counsel for Petitioners

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

14pp

TABLE OF CONTENTS

Page No.

1. The Government Would Have This Court Sanction Judicial Intrusion Into The Legislature's Prerogatives Regarding Federal Tax Programs 1

2. The Government's Contention That The Tax On Exports Can Be Severed Cleanly From The HMRA Is Demonstrably False . . 4

3. The Substantial Weight Given To The WRDA's Severability Clause Is Misplaced 7

4. The CIT's Decision Was Correct 9

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Alaska Airlines, Inc. v. Brock, 480 U.S. 678 (1987) 2,6,7,8

Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) . . 5

Carter v. Carter Coal Co., 298 U.S. 238 (1936) 6

Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976) 8

Reno v. ACLU, 521 U.S. 844 (1997) 7,8

Sloan v. Lemon, 413 U.S. 825 (1973) 6,8

United States v. Grace, 461 U.S. 171 (1983) 6

United States v. Reese, 92 U.S. 214 (1876) 8

United States v. Treasury Employees, 513 U.S. 454 (1995) 1

Virginia v. National Booksellers Ass'n, 484 U.S. 383 (1988) 1

Wisconsin v. Yoder, 406 U.S. 205 (1972) 6

STATUTES AND LEGISLATIVE MATERIALS

26 U.S.C. § 4462(f)(3) 9

26 U.S.C. § 4462(g)(l) 5

26 U.S.C. § 7852(a) 9

H.R. Rep. No. 99-251 2

The Brief in Opposition ("Opp.") filed by the United States (hereafter, the "Government") for the most part recasts as argument the flawed reasoning in the court of appeals' decision. That courts' legal errors and the reasons for granting review of its decision have been addressed in the Petition for Writ of Certiorari ("Pet."). On several issues, however, the Government's defense of the court of appeals' decision fails to turn square corners. These points are addressed briefly below.

1. The Government Would Have This Court Sanction Judicial Intrusion Into The Legislature's Prerogatives Regarding Federal Tax Programs

The Government's position rests, at bottom, on the assertion that, when confronted with a severability question, the courts should make "an inquiry into what option is second-best." Opp. 11. As this Court has held, however, when a court invalidates a substantial portion of a statute, what is "second-best" is for the legislature, not the courts, to decide. *United States v. Treasury Employees*, 513 U.S. 454, 479 & n.26 (1995) ("We believe the Court of Appeals properly left to Congress the task of drafting a narrower statute"; for the court to do so "involves a far more serious invasion of the legislative domain" than striking the entire statute); *Virginia v. National Booksellers Ass'n*, 484 U.S. 383, 397 (1988) (unless a statute is "readily susceptible" to a narrow construction, the Court "will not rewrite [the law] to conform to constitutional requirements").

The Government seeks to overcome this fundamental problem by positing that "nothing in the [HMRA's] legislative history demonstrates that, if Congress had known it could not impose the [tax] on exports, it would instead have chosen no tax at all." Opp. 12. This observation, even if true, is irrelevant. As the Government acknowledges, the critical question is not whether Congress would have chosen no tax over a truncated tax, but whether Congress would have enacted the severed statute in the first instance. Opp. 6. The HMRA's

legislative history shows that Congress considered a variety of tax systems before it adopted the HMRA's *ad valorem* approach.[1/] Had Congress been certain that the tax on exports would be found unconstitutional, it would presumably have adopted one of those other systems -- not simply elected "no tax at all." By imposing a scheme of its own making, the court of appeals has left Congress and the country with a statute that is certainly not the "second-best" option that Congress considered.

In like vein, the Government adopts the court of appeals' suggestion that Congress would have wanted the tax to remain in place without exports because the purpose of the HMRA was to raise revenue, and the statute will continue to do so even if exports are excluded. Opp. 10-11. As the Court noted when it rejected a similar argument in *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 n.7 (1987), however, this reasoning is "tautological, as Congress' intent to enact a statute on the subject is apparent from the existence" of the statute itself. By the Government's flawed logic, every tax or regulatory statute is by definition severable, because Congress would *always* want half a loaf if it could not have a whole one. Indeed, by the same logic, one could argue that *no* statute is severable, as every severed statute is one that Congress chose not to pass.

The Government, like the court of appeals, ignores the legislative history of the HMRA, which confirms Congress' intention to impose a uniform tax on all domestic and foreign cargo, and dismisses Congress' undeniable reluctance to discriminate among cargo types. Pet. 12-15. In this regard, the Government simply repeats the Federal Circuit's conclusion that Congress' concerns regarding a non-uniform tax were, and continue to be, "speculative." Pet. App. 16a; Opp. 12. It is not

---

1/ *See* H. R. REP. No. 99-251, pt. 4, at 24, 26 (1985).

for the courts to say, however, whether Congress' concerns were legitimate or not. The question is whether, on the date of enactment, Congress would have passed a statute that excluded exports. *See* Opp. 6. As the court of appeals agreed, there is evidence that Congress was "so fearful" of the consequences of a statute without exports that it would not have risked such a scheme. Pet. App. 16a. By denying legitimacy to Congress' concerns, the court of appeals impermissibly usurped a legislative function.[2/]

Finally, much is made by the Government of the fact that Congress knew that the tax on exports might raise a significant constitutional question. Opp. 10-11. That point, however, cuts against the decision below. In light of the constitutional question, Congress could have enacted a tax on all cargo except exports, or a distinct tax on exports, imports and other cargo -- each category separate and severable. Instead, Congress imposed a uniform tax on "*any* port use" (*see* Opp. 2), and made clear that it intended the tax to be uniform and nondiscriminatory among cargo types. The fact that Congress crafted the statute to cover "any port use," including exports, even in the face of constitutional concerns, demonstrates that it would not have enacted the statute with that category of cargo excluded.[3/]

[2/] The Government and the court of appeals discount Congress' concerns because the complaints of our trading partners might not have merit. Opp. 12 and Pet. App. 16a. Nonetheless, the issue Congress feared would arise is now on the international trade agenda. Pet. App. 51a-52a. The fact that the issue has been raised alters the dynamics of our country's trading relationships, and could well affect this country's ability to pursue its own interests. The effect of this situation on our foreign relations is not for a court to judge.

[3/] Severance of exports would have had other consequences as well. For example, without revenue from exports, the reduced tax receipts would have limited Congress' ability to finance port projects; financing these

(continued...)

2. The Government's Contention That The Tax On Exports Can Be Severed Cleanly From The HMRA Is Demonstrably False

The Government asserts that the HMRA's provisions regarding exports can "straightforwardly" be severed from the statutory text, and that what remains will still function in the manner Congress intended. Opp. 9. That is not true. Severing exports from the HMRA is a messy business indeed.

As the Government acknowledges the statutory scheme begins with the assessment of the tax on "*any* port use." Opp. 2. The severance process thus requires, as an initial matter, elimination of the word "any."

To implement the severance plan endorsed by the court of appeals, other statutory alterations are also required. The statute defines "port use" to mean "loading or unloading" of cargo. Opp. 2. In order to excise exports, which are "loaded" onto ships, one would have to sever "loading" from the statute. That step, however, would also exempt many coastwise shipments and passenger cruises from the tax, since the tax is assessed on "loading" in those cases as well. The Government's proposed statute, therefore, would impose the entire tax burden only on "unloaded" cargo -- meaning imports, and the remaining passenger cruises and coastwise shipments. *See* Opp. at 9 (under the severed statute, the tax would be paid only "at the time of unloading"). Thus, severance of exports

---

[3] (...continued)
projects, all agree, was Congress' principal intention in passing the tax. Pet. App. 2a, 28a; Opp. 2. In fact, Congress has sought to *increase* the tax revenues, not reduce them. *Compare* Pet. App. 41a (original tax rate of .04 percent) *with id.* at 19a (current rate of .125 percent).

from the statute would also distort the tax on other types of cargo.[4/]

The Government contends that, notwithstanding the clear distortion of the statute that would result from severing exports, precedent from this Court supports the court of appeals' approach. Opp. 8 (the Court "has held that statutes could not constitutionally be applied in certain situations, without striking them down in their entirety or suggesting any such result").[5/] The cases on which the Government relies, however, demonstrate that the Court has been reluctant to sever statutes where the result would, as here, significantly alter the statute's scope. In *Alaska Airlines*, for example, the Court severed the legislative veto provision from the statute because, "by its very nature [the provision] is separate from the operation of the substantive provisions of the statute." 480 U.S. at 684-85. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985), concerned a statute that regulated "obscene matter." *Id.* at 493. The statute's definition of "obscene matter" included that which "appeals to the prurient interest," or which incites "lust." The Supreme Court held that the term "lust" was overly broad, but was amenable to a limiting construction, accordingly, the statute was invalidated "only insofar as the word 'lust' is to be understood" as reaching protected materials. *Id.* at 504. As noted above, no such "limiting construction" is possible here.

[4/] The severance of exports would also render other provisions of the HMRA meaningless -- for example, the provision which provides that the tax may be assessed only once (*i.e.*, on loading or unloading, but not both). 26 U.S.C. § 4462(g)(l). That this provision even exists confirms Congress' intention to retain both loaded and unloaded cargo, including exports, in the statute.

[5/] The Government's premise -- that the severance issue in this case concerns a statutory application (Opp. 8) -- is wrong. The statute expressly covers exports, so the question is whether that language can be excised from the statute's text without damaging the statutory scheme.

In *United States v. Grace*, 461 U.S. 171 (1983), the Court held that a statute prohibiting leafleting around the Supreme Court could not apply to the sidewalk, but declined to consider the effect of the decision on the remainder of the statute (that is whether the statute could be enforced on the Court grounds). *Id.* at 175 ("[W]e shall address only whether the proscriptions of § 13k are constitutional as applied to the public sidewalks"). Severability was not an issue in the case.

In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), which the Government also cites, the Court upheld a state court decision holding that a mandatory schooling statute could not be applied to the Amish sect. Again, the Court did not directly address severability. As in its later decision in *Alaska Airlines*, however, the Court made clear that, the Amish being a small minority, excepting them would not "undermine" the statutory program, as it would not affect the "general applicability of the State's compulsory school-attendance statutes[.]" *Id.* at 236. *Yoder* thus stands in stark contrast to *Sloan v. Lemon*, 413 U.S. 825 (1973), in which the Court refused to sever a statute as between aid to religious and secular schools; "to approve such a distinction here," the Court reasoned, "would be to create a program quite different from the one the legislature actually adopted." *Id.* at 834. The present case resembles *Sloan*, not *Yoder*. Severing exports from the HMRA, like the proposed removal of religious schools from the statute in *Sloan*, would dramatically change the statute in a way that the legislature certainly never enacted.

The thrust of severability jurisprudence over the decades has been, and remains, that the courts may not redraft federal statutes by their own lights. *See, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238, 313 (1936) (courts may not "give the statute an effect altogether different from that sought by the measure viewed as a whole" [internal quotation marks omitted]); *Alaska Airlines*, 480 U.S. at 685 (the statute, after

severance, must still "function in a *manner* consistent with the intent of Congress" [emphasis in original]); *Reno v. ACLU*, 521 U.S. 844, 884 (1997) (severance was inappropriate in view of the statute's "open-ended character"). The decisions in which the court has severed a statute have typically involved the excision of the single word or discreet provision that rendered the statute unconstitutional. *See, e.g., Reno*, 521 U.S. at 883 ("[W]e will sever [only] the [unconstitutional] term 'or indecent' from the statute, leaving the rest of §223(a) standing"); *Alaska Airlines, supra.* The court of appeals' decision, by contrast, carves away much of the statute, and leaves a hodge-podge tax scheme that Congress could never have contemplated. No principle or authority in the Government's brief justifies that result.

3. The Substantial Weight Given To The WRDA's Severability Clause Is Misplaced

Perhaps the most telling aspect of the Government's argument is its virtual silence on the issue of whether the court of appeals' approach to severability was proper at all. The court relied on the severability clause in the WRDA, and the "presumption" of severability purportedly established in *Alaska Airlines*. Pet. App. 11a. As Petitioners have pointed out, this "presumption" does not have a solid foundation in the case law, and directly conflicts with the dominant line of Supreme Court decisions in which the Court declined to sever a statute out of concern that doing so would intrude on legislative prerogatives. Pet. 18-24. The court of appeals itself acknowledged these "different formulations" of the severability standard in Supreme Court precedent. Pet. App. 11a.

The Government, in a footnote, purports to reconcile the different approaches to severability exemplified by *Alaska Airlines* and *Reno*. Opp. 9-10, n.6. The Government does not even attempt to distinguish the other cases cited in the Petition

(such as *Sloan* and *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976)), and it ignores entirely the critical language in *Reno* in which the Court cautions against severing statutes. Indeed, given the proposition that Congress was aware that the HMRA was subject to an Export Clause challenge (Opp. 10), the admonition in *Reno* that "judicial rewriting of statutes would derogate [from] Congress' incentive to draft a narrowly tailored law in the first place" has a great deal of force. 521 U.S. at 885 n.50 (internal quotation omitted). As the Court held, "It would certainly be dangerous" to allow Congress to draft broad statutes of questionable validity, and leave to the courts the task of redrafting the statutes to conform to constitutional norms. *Id.* at 884, n.49, quoting *United States v. Reese*, 92 U.S. 214, 221 (1876). Yet that is exactly what the court of appeals did here.

Moreover, contrary to the Government's view, the WRDA's severability clause has no application to this case. According to the Government, "The clause appears in Title XIV of the WRDA, entitled 'General Provisions,' and its use of the term 'this Act' naturally refers to the entire WRDA -- of which Title XIV, enacting the HMT, is a part." Opp. 7, n.5. That is true, but the Government (like the court of appeals) misconstrues the effect of the WRDA's severability clause. The clause provides that "If any provision of this Act [*i.e.*, the WRDA]" is found unconstitutional, the remainder of the WRDA "shall not be affected thereby." Pet. App. 50a. The "provision" to which the WRDA severability clause applies is section 1402 of the WRDA, the *entire* tax, and not the separate provisions concerning cargo types. In other words, if the tax is unconstitutional, the WRDA is preserved; but the WRDA's severability clause does not permit severance of one tax provision from another.

The interplay between the WRDA and the HMRA makes this point clear. For example, whereas the Government

contends that the HMRA and the WRDA are the same "Act," the HMRA refers to the WRDA as a separate statute. Pet. App. 46a (referring, within the HMRA, to "section 1407(a) of the Water Resources Development Act of 1986"). Moreover, the text regarding the tax as enacted in the WRDA (*see* Pet. App. 41a-49a) is set forth in quotation marks, indicating that Congress intended the statute to be treated as a consolidated, inseverable unit. Nothing in the WRDA's severability clause indicates that Congress intended it to be used as a tool to pierce into the tax, and dismember its constituent parts. Finally, the WRDA's severability clause is included with the rest of that statute in 33 U.S.C., while the tax provisions are codified in 26 U.S.C., the Internal Revenue Code ("IRC"). The appropriate place to look for a severability clause relevant to the tax provisions, therefore, is in the IRC. Yet Congress provided that the IRC severability clause does not apply to this tax.[6] Accordingly, viewed in the context of the tax's structure, location, and terms, the WRDA's severability clause does not permit the severance of exports from the HMRA.

4. The CIT's Decision Was Correct

The Government accuses Petitioners of failing to defend the reasoning on which the Court of International Trade based its decision striking the HMRA in its entirety. Before the Federal Circuit, however, Petitioners noted that the CIT's decision rested on the correct observation that the HMRA "has equated passengers with cargo," and the tax on the "loading" of cargo had been held unconstitutional. The CIT's observations on the structure and language of the statute support the view that it is inseverable as between cargo types. What Petitioners did not defend was the Government's erroneous view that the

---

[6] The IRC's severability clause, 26 U.S.C. § 7852(a), is in IRC subtitle F. Pursuant to 26 U.S.C. § 4462(f)(3), subtitle F does not apply to the HMRA.

CIT had held the tax unconstitutional as to passengers under the Export Clause. In any event, the CIT's treatment of the statute was correct, and its judgment should be reinstated.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT H. BORK
1150 Seventeenth St., N.W.
Washington, D.C. 20036
(202) 862-5851

ROBERT P. PARKER*
ROBERT E. MONTGOMERY, JR.
GAELA GEHRING FLORES
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
1615 L Street N.W.
Washington, D.C. 20036
(202) 223-7300

Counsel for Petitioners

* Counsel of Record

Dated: June 12, 2000